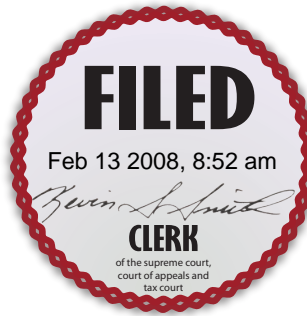


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

PERRY M. SCROGGINS,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 65A05-0704-PC-186

APPEAL FROM THE POSEY CIRCUIT COURT
The Honorable James M. Redwine, Judge
Cause No. 65C01-9207-CF-19

February 13, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Perry M. Scroggins (Scroggins), appeals the trial court's denial of his Motion to Enforce Plea Agreement.

We affirm and remand.

ISSUE

Scroggins raises one issue on appeal which we restate as follows: Whether the trial court properly denied Scroggins' Motion to Enforce Plea Agreement.

FACTS AND PROCEDURAL HISTORY

On September 22, 1992, Scroggins was sentenced to two consecutive ten-year sentences for two burglary convictions to which he pled guilty. Of the twenty-year sentence, the trial court ordered eight years executed with the remaining twelve years suspended to probation. On July 14, 1997, the trial court modified Scroggins' sentence, pursuant to his Petition to Modify Sentence and an Agreed Entry entered into by the parties, to four years executed in a work release program, with the remaining sixteen years suspended to probation. On January 20, 1998, the trial court held a hearing on the State's Petition to Revoke, alleging Scroggins violated the terms of his work release program. The trial court granted the State's Petition and modified Scroggins' sentence ordering him to serve five years at the Indiana Department of Correction with the remaining fifteen years suspended to probation.

On January 12, 2000, Scroggins' probationary period started. Thereafter on February 3, 2003, the State filed a Petition to Revoke Scroggins' probation alleging violations of the controlled substances prohibition and the good behavior condition of his probation. A

hearing was not held until May 10, 2004, in part due to Scroggins being indicted, tried, found guilty, and sentenced to fifteen years in federal prison on five illegal possession of firearms charges. Subsequently, per an agreement with the State, Scroggins admitted to the allegations in the State's Petition to Revoke. As a consequence, the trial court revoked Scroggins' probation and ordered his fifteen-year suspended sentence revoked and executed concurrent to the fifteen-year sentence he received in federal court.

On January 8, 2007, upon learning he was not receiving credit toward his federal sentence for the time served in the Indiana Department of Correction, Scroggins filed a Motion to Enforce Agreement. On January 25, 2007, the trial court denied Scroggins' motion. On February 26, 2007, Scroggins filed a Motion to Reconsider Denial of Motion to Enforce Agreement wherein he asked to be transferred to federal prison so that he would be able to serve both sentences concurrently. That same day, the trial court denied Scroggins' Motion.

Scroggins now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Scroggins argues the trial court improperly denied his Motion to Enforce Agreement. Conversely, the State first argues Scroggins' appeal should be dismissed as untimely. Alternatively, the State contends the trial court cannot provide the relief requested by Scroggins. First, we will address the State's argument that Scroggins' appeal should be dismissed.

I. *Timeliness*

The State argues Scroggins' appeal should be dismissed because it is untimely. In particular, the State claims more than the allotted thirty days in which to file an appeal after the trial court denied Scroggins' Motion to Enforce Agreement passed before he filed his notice of appeal. In his reply brief, Scroggins counters that his Motion to Reconsider Denial of Motion to Enforce Agreement was technically a motion to correct error and therefore his filing of a notice of appeal did not exceed the allotted thirty day time period.

A party initiating an appeal must file the notice of appeal within thirty days after the entry of a final judgment. Ind. Appellate Rule 9(A)(1). "However, if any party files a timely motion to correct error, a [n]otice of [a]ppeal must be filed within thirty []days after the [trial] court's ruling on such motion" *Id.* Because a trial court may only consider a motion to reconsider prior to entering a final judgment, a motion requesting a trial court revisit its final judgment must be considered a motion to correct error. *See* Ind. Trial Rule 53.4; *see also Hubbard v. Hubbard*, 690 N.E.2d 1219, 1221 (Ind. Ct. App. 1998).

In the instance case, Scroggins filed his Motion to Reconsider Denial of Motion to Enforce Agreement after the trial court's final judgment on his Motion to Enforce Agreement. We decline to favor form over substance and, despite its caption, Scroggins' Motion to Reconsider Motion to Enforce Agreement should have been treated as a motion to correct error. *See Hubbard*, 690 N.E.2d at 1221. Thus, Scroggins' deadline for filing his notice of appeal is thirty days from when the trial court denied his Motion to Reconsider on

February 26, 2007. Therefore, Scroggins' notice of appeal filed on March 22, 2007, was timely filed.

II. *Scroggins' Sentence*

Scroggins argues the trial court improperly denied his Motion to Enforce Agreement. Specifically, Scroggins contends that since the trial court ordered his sentence to run concurrent to his federal sentence, the trial court should transfer him to federal prison in order for him to receive credit for his sentence in federal court as well as receive credit from the State, thereby effectively enforcing his agreement with the State. However, because we conclude that the trial court had no authority to impose a concurrent sentence, we determine that the trial court could not have abused its discretion by denying Scroggins' Motion to Enforce Agreement.

Indiana and the United States are separate sovereigns. As such, a concurrence of a sentence made by one sovereign does not bind another. *Jake v. Herschberger*, 173 F.3d 1059, 1065 (7th Cir. 1999). A federal district court has the undoubted power to impose a federal sentence that is not to commence until service of an existing state sentence for an unrelated offense has been completed. *See Pinaud v. James*, 851 F.2d 27, 31 (2nd Cr. 1988). "A prisoner may not, by agreeing with the state authorities to make his sentence concurrent with a federal sentence, 'compel the federal government to grant a concurrent sentence.'" *Jake*, 173 F.3d at 1065 (quoting *Pinaud*, 851 F.2d at 30). The federal court ordered Scroggins to serve his sentence consecutive to the pre-existing Indiana sentence. Therefore, the trial court exceeded its authority when it ordered Scroggins to serve his sentence, which

had been previously suspended, concurrent to his federal sentence. Accordingly, we conclude that the trial court could not abuse its discretion by denying his Motion to Enforce Agreement.

Nevertheless, it is apparent that Scroggins' guilty plea was not voluntary. "Promises which induce guilty pleas must be fulfilled in order to satisfy the voluntariness of the guilty plea standard." *Epperson v. State*, 530 N.E.2d 743, 745 (Ind. Ct. App. 1988). A prosecutor's failure to adhere to any promise which induced a guilty plea would constitute a breach of the plea agreement with the result that the plea loses its voluntary character. *Id.* While we do not have the plea agreement in the record before us, he has represented to us that he pleaded guilty in return for a guarantee that his sentence would be concurrent to his federal sentence, which the trial court could not order. The State has not challenged this assertion, either before the trial court or on appeal. Therefore, Scroggins must be given an opportunity to withdraw his guilty plea.

CONCLUSION

Based on the foregoing, we conclude Scroggins timely filed his notice of appeal. However, because the concurrent nature of his sentence was unenforceable by an Indiana court, the trial court did not abuse its discretion when it denied Scroggins' Motion to Enforce Agreement. Finally, it is apparent that Scroggins' guilty plea was not voluntary; therefore, we must remand so that he may have an opportunity to withdrawal his plea.

Affirmed and remanded for further proceedings consistent with this opinion.

KIRSCH, J., and MAY, J., concur.